(16)

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1940

No. 151

A. M. GILSTRAP,
Petitioner,

vs.

STANDARD OIL COMPANY (an Ohio corporation), and STANDARD OIL COMPANY OF CALIFORNIA (a corporation), SAN MARTINEZ OIL COMPANY (a corporation), J. A. BROWER, and W. N. BROWER, EARL WARREN, JOE BRANDON, M. B. DRIVER, ROBERT P. TRACY, SAMUEL BERRY, GEORGE C. PERKINS, DONALD A. PEARCE, W. H. DONAHUE, KATIE A. CONNIFF, FRANK M. CARR, L. E. VAN PATTEN, HUGO RADBRUCH, and MARK W. GARBINI, and HEARST PUBLICATIONS, INCORPORATED (a corporation), THE CHRONICLE PUBLISHING COMPANY (a corporation), THE TRIBUNE PUBLISHING COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENTS, HEARST PUBLICATIONS, INCORPORATED, THE TRIBUNE PUBLISHING COMPANY AND THE CHRONICLE PUBLISHING COMPANY, OPPOSING GRANTING WRIT OF CERTIORARI.

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No. 151

A. M. GILSTRAP,
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vs.

STANDARD OIL COMPANY, et al.,
Respondents.

BRIEF OPPOSING GRANTING WRIT OF CERTIORARI.

Respondents, Hearst Publications, Incorporated, The Tribune Publishing Company and The Chronicle Publishing Company, respectfully oppose granting a Writ of Certiorari in this case on the following grounds:

1. a. That the District Court had no jurisdiction because of absence of allegations showing diversity of citizenship;

b. That the complaint states no cause of action under the anti-trust law or otherwise;

c. That the publications pleaded are not libelous per se and cannot be made libelous by innuendo as attempted by Petitioner;

d. That the action against these Respondents is barred by the Statute of Limitations.

2. a. The Petitioner has failed to file with his Petition filed herein June 13, 1940, any transcript of the record, as required by subdivision 1 of Rule 38 of this Court;

b. No notice of the filing of the Petition, nor any copy of the Petition nor of the printed record nor of the supporting brief was served on counsel for these Respondents within ten days after filing of the Petition, as prescribed by subdivision 3 of Rule 38 of this Court, nor at any time prior to August 12, 1940;

c. The Petition fails to set forth any of the facts required to appear as a basis for granting a Writ of Certiorari, as indicated or suggested by subdivision 5 of Rule 38 of this Court.

We respectfully direct the attention of the Court to the fact that we are not parties to, and have no interest in, Case No. 150 in which a Writ of Certiorari is also requested by Petitioner. Petitioner's Summary of Facts, Resume of Questions Involved, Statement of Reasons urged for granting the Writs and the Brief and Argument presented to this Court by Petitioner, combine and confuse Case No. 150, in which we have no interest with Case No. 151, in which we are Respondents, so as to make it appear that the two

cases are similar, if not identical, as to facts and issues.

Our Case No. 151 is a libel suit and should be considered as such and not otherwise.

I.

SUMMARY OF THE ALLEGATIONS OF AMENDED COMPLAINT.

(In the following summary, the Roman numerals refer to the corresponding numbered paragraphs of the Amended Complaint.)

The First Amended Complaint is entitled "FIRST AMENDED COMPLAINT: LIBEL".

The important allegations of the Amended Complaint, in so far as they affect the newspaper Respondents, are the following:

That plaintiff is a resident and citizen of California, City of Fresno, in the Southern District of California; that certain of the defendants are also California residents with California businesses. (I to IV) (R. 81-3.)

That certain public officers aided and abetted certain other defendants (not including the newspaper defendants) in furnishing the newspaper defendants with the stories published by said newspaper defendants. (VI) (R. 84-5.)

That certain defendants (not including the newspaper defendants) conspired to publish untrue stories

against plaintiff in order to acquire his property. (VIII) (R. 86-7.)

That defendants (not including the newspaper defendants) conspired to have published a story that plaintiff was guilty of grand theft and was guilty of and had committed violations of the Corporate Securities Act (a felony) (X and XI) (R. 89-91); in that defendants (not including the newspaper defendants) caused to be published in the defendant The Tribune Publishing Co.'s OAKLAND TRIBUNE, in defendant Hearst Publications, Inc.'s OAKLAND POST ENQUIRER, and in defendant The Chronicle Publishing Co.'s THE SAN FRANCISCO CHRONICLE, stories (set out in haec verba) in which it is stated that plaintiff was *arrested* on a warrant charging violations of the Corporate Securities Act, feared an invasion of his property by competitive oil companies, and that battles had occurred with regard to plaintiff's property. (XII, XXI, XV, XVIII) (R. 91-94; 109-113, 97-101, 103-106.)

That the newspaper stories to the effect that the plaintiff was arrested and was charged with a crime meant and were understood by people generally to mean that he was guilty of and had been convicted of a felony (XIII, XVI, XIX) (R. 94-96, 101-103, 106-108); that although plaintiff had been convicted before an Alameda County jury on a charge of violating the Corporate Securities Act and grand theft, had been sentenced to prison and had served a sentence therefor (last paragraph XXXI, XXXII) (R.

128-9), plaintiff was in fact innocent since he had acted in reliance upon an opinion of the Attorney General.

That as a result of the acts complained of, plaintiff's right of privacy has been violated by the alleged defamations and violations of this privacy to his damage in the sum of $37,500,000. (XXVIII) (R. 122-3.)

That prior to the first publications and alleged libels, plaintiff's reputation and standing was good. (XXIX) (R. 123-4.)

That he served a sentence upon his conviction of grand theft and violation of the Corporate Securities Act in the County Jail and State of California penitentiary from March 1, 1933 until May 13, 1937. (XXXII) (R. 129.)

That the damage to which plaintiff is entitled on account of defendants' alleged libels should be increased by reason of the alleged malice of defendants and acts of defendants in taking away and wrongfully appropriating plaintiff's property (last paragraph XXIV) (R. 118-9); that all of the acts complained of were for the "objects and purposes of defaming, libeling and discrediting plaintiff's reputation, public opinion and character". (First paragraph XXXIV) (R. 130-1.)

In his prayer, plaintiff prays for judgment of $37,500,000 and an additional $112,500,000 exemplary damages, or an aggregate of $150,000,000, and for costs.

In its essence then, the complaint is brought by a California citizen against California citizens and others, alleging that libels were committed by the publication of true statements that plaintiff was arrested and charged with criminal offenses (grand theft and violations of the Corporate Securities Act), despite the fact that it appears in the Complaint that he was convicted for said grand theft and for violations of the Corporate Securities Act.

We shall proceed to a discussion of the points involved as follows:

II.

THE DISTRICT COURT LACKED JURISDICTION: THERE WAS NO DIVERSITY OF CITIZENSHIP.

It is elementary that the facts upon which jurisdiction of the Federal Court rests must appear affirmatively in the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.

Wolfe v. Hartford Ins. Co., 148 U. S. 389.

It is also elementary that for jurisdictional purposes the controversy is not between citizens of different states within the meaning of Judicial Code Section 24, unless all of the persons on one side of it are citizens of different states from all the persons on the other side.

Southern Pacific Co. v. Denton, 146 U. S. 202;
Perez v. Canadian Land & Fur. Co., 14 Fed. (2d) 181.

The record in this case fails to affirmatively show diversity of citizenship and the Court was, accordingly, compelled to dismiss this action for lack of jurisdiction.

III.

THE DISTRICT COURT LACKED JURISDICTION: NO FEDERAL QUESTION WAS INVOLVED.

In the District Court Petitioner did not claim that the suit was one arising under the Constitution or laws of the United States.

In his brief, however Petitioner argues that his complaint states a cause of action for violation of the Anti-Trust Laws of the United States. In support of such inference, he refers to paragraph XVIII and the end of paragraph XXIV. (R. 93-94, 103-104-105.) In paragraph XVIII, Petitioner does not allege any *facts* showing any violation of any Federal statute, but merely by way of *recital* refers to "Anti-Trust Laws of these United States". Petitioner's specific allegation is that defendants "also continuing their unlawful same scheming in violation of Anti-Trust Laws of these United States, same defendants agreeing and so planning to do * * * to thereby blacken, discredit, besmirch and libel this plaintiff did * * * cause to be published by defendant The Chronicle Co.'s 'San Francisco Chronicle' " a certain alleged libel.

In the first place, any allegation merely to the effect that a certain action is contrary to the Constitution

or Anti-Trust Laws is a mere conclusion of the pleader and must be disregarded.

See:

Sacramento and San Joaquin Drain. Dist. v. Superior Ct., 196 Cal. 414.

In the second place, matters of substance must be presented by direct averment and may not be stated in the form of recitals.

Stefani v. S. P. Co., 119 Cal. App. 69, 5 Pac. (2d) 946;

McClellan v. State, 119 Cal. App. 535, 6 Pac. (2d) 994, certiorari denied in 287 U. S. 611, 53 Supreme Ct. 14, 77 Law. Ed. 531;

Johnson v. Fletcher, 97 Cal. App. 153, 274 Pac. 1001;

and see

Swasey v. de L'Etanche, 17 Cal. App. (2d) 713, 62 Pac. 753.

It is elementary that the jurisdictional averments must be positive and not argumentative.

Hanford v. Davis, 163 U. S. 273, 16 Supreme Ct. 1051, 41 L. Ed. 157.

> "It is not enough that grounds of jurisdiction, other than diverse citizenship, may be inferred argumentatively from the statements in the bill for jurisdiction cannot rest on any ground that is *not affirmatively* and *positively* set forth."
>
> *Shulthis v. McDougal,* 225 U. S. 561, 569, 32 Supreme Ct. 704, 56 L. Ed. 1205.

Moreover, this mere recital that while defendants were continuing scheming in violation of Anti-Trust Laws they libeled plaintiff falls far short of fulfilling the jurisdictional requirement on the ground that a Federal question must appear by distinct, positive averments setting forth the cause of action according to the rules of good pleading.

Where references to a Federal Constitution or law are pleaded as emphasizing the defendant's wrongdoing, they do not import a Federal question in the case.

Martin v. Lankford, 245 U. S. 547, 62 L. Ed. 464.

Federal jurisdiction of a cause as presenting a Federal question is not supported by allegations in a complaint that are much too casual and meagre to give serious color to the claim that the action is one arising under the laws of the United States and where the contention is plainly an after-thought not in the mind of the author of the complaint.

Niles-Bement-Pond Co. v. Iron Molders Union, 254 U. S. 77, 65 L. Ed. 145.

According to the above rules, the mere recitals contained in paragraph XVIII, since they do not even comprise averments, are insufficient to satisfy the requirement that a Federal question can only arise under positive, nonargumentative and clear averments setting forth a cause of action according to the laws of good pleading.

A fortiori, the allegations at the end of paragraph XXIV (R. 103-4-5) do not specify the requirements that the facts averred must show distinctly that the suit arises under some Federal law by his allegations that further damage to plaintiff flowed from defendants' alleged libels through defendants' taking plaintiff's property at various times between 1932 and 1937. Obviously, such averments do not positively, nonargumentatively, affirmatively or distinctly set forth a Federal question by good pleading.

Obviously, this suit for defamation on the ground that defendants caused false statements to be made with regard to plaintiff's arrest is no more one under the Anti-Trust Laws than is a suit for defamation on the grounds that defendants made false statements that plaintiff's patents were an infringement is one arising under the patent laws.

> *American Well Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 36 Supreme Court 585, 60 L. Ed. 987.

None of the cases cited by plaintiff supports his inference that the First Amended Complaint sets forth a Federal question.

Since there are no presumptions in favor of the Courts of the United States and the jurisdiction of the United States Courts cannot be enlarged by improper pleading, we respectfully submit that Petitioner's Amended Complaint fails to set forth any allegation showing that Petitioner's alleged cause of action is one which involves a substantial Federal question. Since the amended complaint fails to set forth any

diversity of citizenship or any Federal question, the District Court lacked jurisdiction and, accordingly, was compelled to dismiss this action for lack of jurisdiction.

IV.

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

The gist of the complaint is that in accordance with a plan made with their co-defendants these Respondents published articles to the effect that plaintiff A. M. Gilstrap was "arrested * * * on a warrant charging him with violating the Corporate Securities Act and grand theft", that he feared rival oil companies would attempt to invade his property and that there have been armored battles with regard to this property.

Despite statements of the complaint that these publications were false and defamatory, it affirmatively appears from the complaint that Petitioner was not only arrested on a warrant charging him with violating the Corporate Securities Act and grand theft, but was convicted, both for violation of the Corporate Securities Act and for grand theft. It, accordingly, affirmatively appears from the complaint that the publications were privileged publications under the provisions of subdivisions 4 and 5, section 47 of the Civil Code of the State of California.

V.

THE PUBLICATIONS ARE NOT LIBELOUS PER SE AND CANNOT BE MADE SO BY INNUENDO.

It is obvious and has many times been held that a statement that a person *is charged* with a criminal offense is not the equivalent of stating that he is a criminal or is guilty. It is elementary "that an innuendo cannot read into a publication a meaning which it does not bear on its face".

Yankwich's Essays on the Law of Libel, pages 87 to 96 and page 43.

Stated otherwise:

> "The innuendo cannot ascribe a meaning to the defamatory matter other or broader than the words themselves naturally bear, when read in the light of the inducement. An innuendo helps nothing unless the words to which it applies have a violent presumption of the innuendo. An unwarranted attempt to extend defamatory meaning merely by innuendo will not save the cause of action; and an innuendo which violates this rule will be rejected as surplusage."

16 *Cal. Jur.* sec. 58, pages 89, 90, citing many cases.

Applying the above rules to the case at bar, the innuendo here must be rejected as surplusage, leaving the sting of the publication merely that Petitioner A. M. Gilstrap was charged with a violation of the Corporate Securities Act and grand theft.

The original complaint in this case was labeled by the Petitioner "Complaint for Libel Damages" (R. 4) and the First Amended Complaint is also labeled

"Libel". (R. 81.) The original and amended complaints bristle with allegations designed to impute evil motives to the defendants actuating them in publishing the alleged libels. However, the complaint must stand or fall so far as these Respondents are concerned according to whether or not the publications complained of were actually libelous and actionable as such. It is elementary that a publication which is not libelous does not become so because of the motives which suggested the publication.

VI.

PETITIONER'S CAUSE WAS BARRED BY THE STATUTE OF LIMITATIONS.

The complaint alleges that the publications complained of all occurred in October, 1932. This action was commenced November 3, 1938. The complaint alleges that the Petitioner was confined in the County Jail and the State Penitentiary from March 1, 1933 to May 13, 1937. On the face of the complaint it appears that he had five months before he was imprisoned and eighteen months after he left prison to commence this suit. This action is barred in one year. (Section 340, subdivision 3, California C. C. P.) Petitioner had twenty-three months when he was under no disability within which to commence the action and his undue delay bars this action. Section 352 California C. C. P., on which Petitioner relies does not avail him because his disability did not exist at the time his cause of action accrued.

VII.

THE OBJECTION TO VENUE IS VALID.

In addition to the foregoing it is to be observed that the action was brought in the wrong district and wrong division.

A careful examination of this complaint discloses that there is no allegation to the effect that the *plaintiff* or any of the defendants resided in or were inhabitants of the Southern District of California, Central Division.

> "These rules (new rules) shall not be construed to extend or limit the jurisdiction of the District Courts of the United States for the venue of actions therein (Rule 82)."

> "The rule is, under the present Act, that in personal suits founded on diversity of citizenship only, the defendant must be sued (a) in his own state, and in the division of the judicial district of which he is an inhabitant, or (b) in the state of plaintiff's residence, and in any division of the Federal District in which the plaintiff resides, if the defendant can be served there."
>
> *Simkins Federal Practice,* Third Edition, section 63, page 88, citing cases.

Applying these rules to the case at bar, it will be found that here (a) the Respondents were not sued in the Division of Judicial District in which they or any of their co-defendants were inhabitants, and (b) they were not sued in any division of the Federal District in which Petitioner resides. This case does not fall within any exceptions to the rule.

If a suit is brought against the defendant in the wrong Division of his District—in any Division other than that in which he resides—the objection is well taken and seasonably made and the Court has no power to transfer to the appropriate Division.

Simkins Federal Practice, Third Edition (1938), Section 79, pages 100-1.

It is respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
August 30, 1940.

GROVE J. FINK,
Attorney for Respondent,
Hearst Publications, Incorporated.

ROBINSON, PRICE & MACDONALD,
Attorneys for Respondent,
The Tribune Publishing Company.

PERCY E. TOWNE,
Attorney for Respondent,
The Chronicle Publishing Company.

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No. 151

A. M. GILSTRAP,
Petitioner,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, STANDARD OIL COMPANY, AN OHIO CORPORATION, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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OPINIONS BELOW.

The remarks of the judge of the district court concerning his rulings on the various motions (No. 150, R. 283; No. 151, R. 377) are unreported. Both cases were disposed

of by the circuit court of appeals in one opinion (No. 150, R. 329; No. 151, R. 446), which is reported in 108 F. (2d) 736.

JURISDICTION.

A petition for rehearing in each case was denied by the circuit court of appeals on March 13, 1940 (No. 150, R. 331; No. 151, R. 448). The petition for writs of certiorari was filed June 13, 1940. It was in typewritten form, accompanied only by an uncertified printed copy of the circuit court of appeals record in each case. On or about July 15, 1940, petitioners furnished one certified and nine additional copies of each record, containing the proceedings and opinion in the circuit court of appeals.

The petition for writs of certiorari cannot be deemed to have been timely filed.

Section 8(a), Act of February 13, 1925, 43 Stat. 936, 940 (U.S.C. 28:350);

Rule 38, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE.

No. 150 is an action brought by petitioners in the United States District Court for the Southern District of California to recover $30,000,000 damages, together with "treble damages" and $275,000 attorneys' fees (R. 135, 167). Standard Oil Company, an Ohio corporation (hereinafter referred to as "Standard of Ohio"), two other corporations, and a number of individuals, were named as

defendants. Petitioners are citizens of California (R. 135). One of the corporate defendants[1] and all of the individual defendants whose citizenship is shown by the record,[2] are citizens of California.

No. 151 is an action brought by petitioner in the same court to recover $37,500,000 damages, together with "exemplary damages in Treble That Sum" (R. 81, 132). Standard of Ohio, five other corporations, and a number of individuals were named as defendants. Petitioner is a citizen of California (R. 82). Three of the corporate defendants are California corporations;[3] all of the individual defendants whose citizenship is shown by the record are citizens of California.[4]

Service in each case was made upon Standard of Ohio by delivering a copy of the summons to the Secretary of State of California (No. 150, R. 181; No. 151, R. 146).[5]

Standard of Ohio is a corporation organized and existing under the laws of Ohio; it has never qualified to do business in California; it has never designated the Secretary of State of California or any other person in Cali-

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[1]San Martinez Oil Company, R. 222.

[2]Warren, R. 118; Brandon, R. 122; Driver, R. 120; Tracy, R. 119; Perkins, R. 117; Pearce, R. 130.

[3]San Martinez Oil Company, R. 261; Hearst Publications, Incorporated, R. 81, 182; The Tribune Publishing Co., R. 81-82, 170.

[4]Warren, R. 192-193; Brandon, R. 192-193; Driver, R. 192-193; Tracy, R. 192-193; Berry, R. 194; Perkins, R. 191; Donahue, R. 288; Conniff, R. 267; Carr, R. 200; Van Patten, R. 273; Radbruch, R. 192-193; Garbini, R. 275.

[5]In each case, petitioners failed to deliver to the Secretary of State a statement of the address of Standard of Ohio, as required by the second paragraph of section 406a of the Civil Code of California, and the Secretary, therefore, did not forward a copy of either summons to Standard of Ohio (No. 150, R. 223-225, 277-279; No. 151, R. 258-259, 317-319).

fornia as its agent to receive service of process; it has never transacted business, or maintained an office or any other place of business, or performed services of any kind, in California; it has never owned or had any interest in property, including bank accounts, in California; it has never transported any goods, wares or merchandise within, or into or from, California; it has never executed or performed, or agreed to execute or perform, any contract in California; it has never had an officer, agent, employee, representative, subsidiary, partner or associate, authorized by it to contract, or to conduct business, for or on its behalf, located or residing in California; it has never owned any stock or other interest in a corporation, association, copartnership or business of any kind located, or doing or authorized to do business, in California.[6]

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[6]**No. 150**: Certificate of Frank C. Jordan, Secretary of State of California (R. 225-226); affidavit of Robert V. Jordan, Assistant Secretary of State of California (R. 223-225); affidavit of W. T. Holliday, president of Standard of Ohio (R. 190-199); affidavit of W. J. Semple, vice president and treasurer of Standard of Ohio (R. 200-209); affidavit of F. H. Kelly, secretary of Standard of Ohio (R. 210-219); affidavit of Glen M. Foster, assistant secretary of Standard Oil Company of California (R. 221); affidavit of W. N. Brower, secretary of San Martinez Oil Company (R. 222-223).

No. 151: Certificate of Honorable Frank C. Jordan, Secretary of State of California (R. 262-263); affidavit of Honorable Robert V. Jordan, Assistant Secretary of State of California (R. 258-259); affidavit of W. T. Holliday, president of Standard of Ohio (R. 207-224); affidavit of O. L. Brown, assistant treasurer of Standard of Ohio (R. 224-240); affidavit of F. H. Kelly, secretary of Standard of Ohio (R. 241-257); affidavit of Glen M. Foster, assistant secretary of Standard Oil Company of California (R. 259-260); affidavit of W. N. Brower, secretary of San Martinez Oil Company (R. 261-262); affidavit of Norbert Korte, Esq. (R. 290-298); supplemental affidavits of Messrs. Felix T. Smith, Renato Capocelli, W. F. Hillman, Glen M. Foster and Norbert Korte (R. 331-371).

In each case, Standard of Ohio appeared specially and moved to quash the return of the service of summons upon it and to dismiss the action, on the grounds, among others, that it had not been served with summons and that it was not subject to suit in the Southern District of California (No. 150, R. 188; No. 151, R. 205). The motions were supported by the affidavits referred to above.[7]

The district court granted the motions and dismissed the actions (No. 150, R. 285, 286-287; No. 151, R. 382, 387-388). The circuit court of appeals affirmed (No. 150, R. 330; No. 151, R. 447).

ARGUMENT.

The district court correctly granted the motions of Standard of Ohio to quash service and dismiss the actions. If it be assumed that the amended complaints state causes of action under the antitrust laws—as petitioners apparently contend—the court was without jurisdiction as to Standard of Ohio because that company is not an inhabitant of, nor may it be found in, nor does it transact business in, the Southern District of California.[8]

Act of October 15, 1914, c. 323, sec. 12, 38 Stat. 730, 736 (Clayton Act, U.S.C. 15:22);[9]

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[7]Footnote 6, supra.

[8]See pages 3-4, supra.

[9]Sec. 12 of the Clayton Act provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Eastman Co. v. Southern Photo Co. (1927) 273 U.S. 359, 370-374;

Hansen Packing Co. v. Armour & Co. (S.D. N.Y., 1936) 16 F. Supp. 784, 786-787.

If, on the other hand, it be assumed that no cause of action under the antitrust laws is stated—as obviously is the case—then, since diversity of citizenship is lacking, the district court was without jurisdiction as to Standard of Ohio under section 51a of the Judicial Code (U.S.C. 28:112).[10]

CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari should be denied.

Dated, San Francisco, California,
August 16, 1940.

FELIX T. SMITH,
NORBERT KORTE,
FRANCIS R. KIRKHAM,
Attorneys for Respondent,
Standard Oil Company,
an Ohio corporation.

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[10]Sec. 51a of the Judicial Code, so far as pertinent, provides: "(a) • • • no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; • • •."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.
No. 151

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, a corporation, *et al.*,

Respondents.

Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

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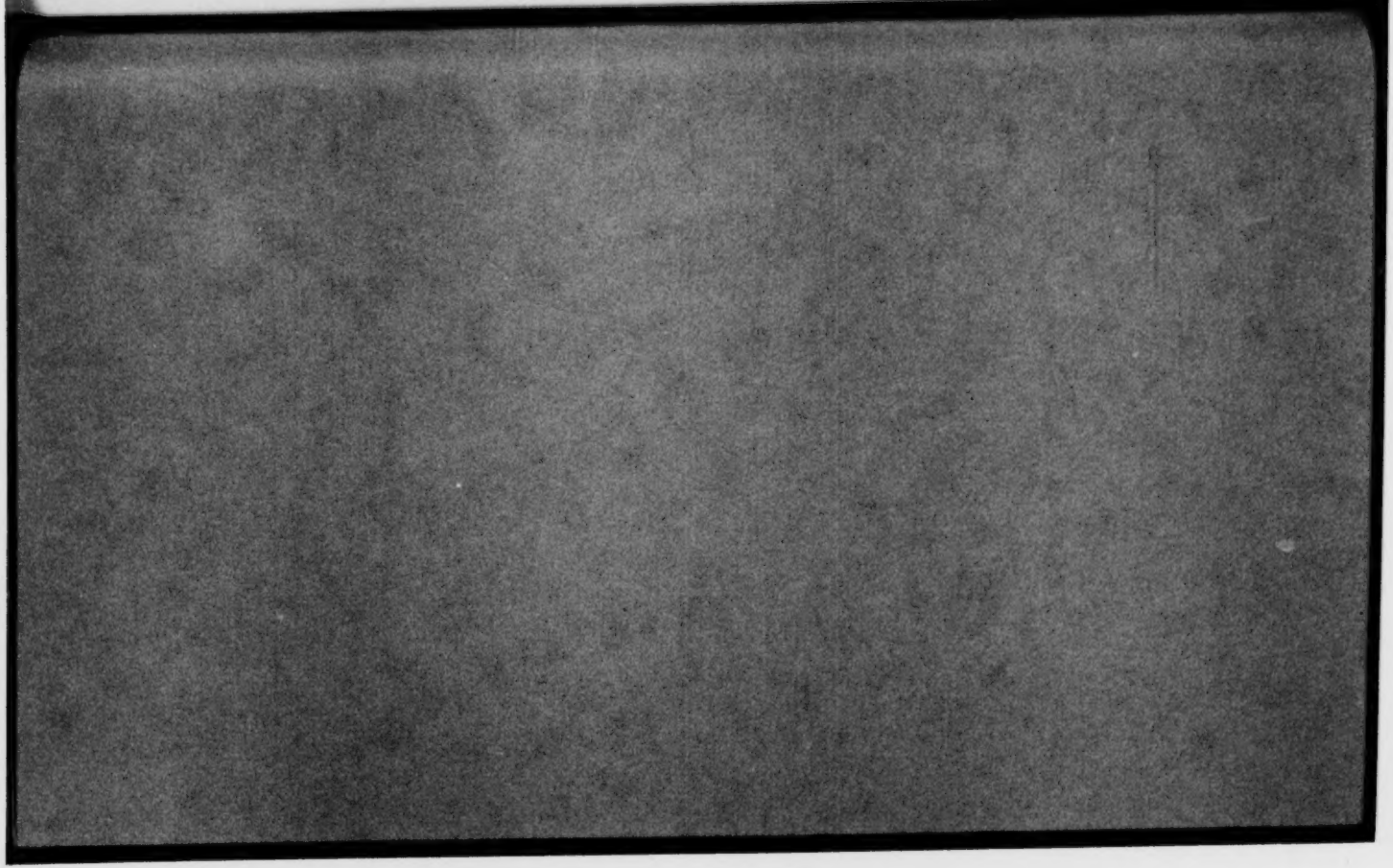

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Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 446] is reported in 108 Fed. (2d) 736. Though no formal opinion was rendered by the District Court, the remarks of that court at the time of its ruling may be found at R. 377-387.

Jurisdictional Statement.

The petition for a writ of certiorari was filed on June 13, 1940, the last day of the three months' period following the denial of the petition for rehearing by the Circuit Court of Appeals [R. 448]. A certified copy of the record was not filed until on or about July 15, 1940. The petition therefore cannot be deemed to have been timely filed (sec. 8(a), Act of February 13, 1925, 43 Stat. 936, 940 (U. S. C. 28:350), Rule 38, Rules of the Supreme Court of the United States).

Statement of the Case.

This action was commenced November 3, 1938 [R. 45], in the United States District Court for the Southern District of California, Central Division, by petitioner, a citizen and resident of California [R. 82]. The defendants named in the complaint include Hearst Publications Incorporated and Tribune Publishing Company, both California corporations [R. 81], and a number of individuals whose citizenship is not alleged, but who are shown, by affidavits in the record, to be citizens of California [R. 193, 200, 267, 273, 275, 287-288].

The original complaint, entitled "Complaint for Libel Damages" [R. 4], was, after a hearing, supplanted by a "First Amended Complaint: (Libel)" [R. 81]. Respondent filed an answer to this complaint, setting up, as affirmative defenses, lack of jurisdiction and failure to state a claim upon which relief could be granted [R. 277-278]. Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, these affirmative defenses were brought on for hearing prior to trial, and were sustained. Judgement dismissing the action was accordingly entered [R. 397].[1] Upon appeal, the Circuit Court of Appeals affirmed the judgment [R. 447], and denied a petition for rehearing [R. 448].

The complaint seeks recovery of $37,500,000.00 plus exemplary damages in treble that amount [R. 132]. The

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[1]Motions to dismiss filed by other respondents were heard and granted at the same time, and judgments of dismissal entered [R. 387, 389, 390, 392, 396, 398, 400].

facts upon which petitioner relies are obscure and are not stated in his petition. Examination of the complaint, however, reveals allegation of the following:

1. That at all times mentioned in the complaint, except during his "Disability," plaintiff "leased, bought, explored, discovered, drilled for and obtained" oil and gas "in and from mineral-bearing lands" in Yolo and Alameda Counties in California, and had discovered large quantities of oil and gas in 40,000 acres of land in Yolo County and in 2,743 acres of land in Alameda County [R. 82-83].

2. In October, 1932, and while plaintiff was drilling for oil on lands owned and on lands leased by him, four newspaper articles of alleged libelous character were published by respondents Hearst Publications Incorporated, Chronicle Publishing Company, and Tribune Publishing Company. These articles described the arrest of plaintiff on a warrant charging violation of the California Corporate Securities Act and grand theft [R. 91, 97, 104, 109]. The newspaper articles also related Gilstrap's contentions that the warrant was a result of a frameup [R. 98]; that he was innocent of the charges on which he was arrested [R. 106]; that he had pending a ten million dollar lawsuit against Standard Oil Company on a claim that he was defrauded out of oil lands in Yolo County [R. 106, 112]; and that it was necessary to maintain guards [R. 93] because hirelings of rival oil companies had invaded his property and threatened to kidnap his son [R. 110-111]. It is further alleged [R. 115] "That owners and lessors of said lands . . . read and believed . . . all said publications to be true, and thereupon cancelled and were caused to

cancel each and every of said leases and leaseholds . . ."

3. Petitioner was arrested at the time, and upon the charges described in the so-called libelous publications [R. 89, 129]. Thereafter a trial was had, and though the charge is alleged to have been illegal, petitioner was convicted of violation of the Corporate Securities Act and served a term in the California State Penitentiary [R. 129].

4. In October, 1932; October, 1936; January, 1937; May, 1937; and September, 1937, all of the defendants are alleged, on information and belief, to have broken into petitioner's home and to have stolen certain documents, papers and personal effects [R. 116-118].

It is also alleged in the form of a conclusion of the pleader, and upon information and belief, that the acts of defendants resulted from a combination and conspiracy to acquire certain land and certain oil leases of plaintiff [R. 86], and that "said defendants did carry out and accomplish aforesaid plan, scheme and conspiracy thereby, as was so agreed and made by them" [R. 115]. Except for these conclusions nothing is stated as to how or when the conspiracy was formed or as to how or when its purpose was accomplished. If plaintiff meant to allege that defendants acquired his "leases and leaseholds" after their cancellation, it is assumed that he would have alleged how they were acquired, when they were acquired, and whether or not the drilling or other obligations thereof were performed by defendants. Apparently a portion of the land in question was owned by plaintiff [R. 91] rather than leased by him. How or when, if at all, defendants acquired this land is not alleged.

It is impossible to determine from petitioner's complaint, the theory upon which the action was brought. Though denominated a "First Amended Complaint: (Libel)" [R. 81], petitioner's pleading contains in addition to allegations pertaining to a libel action reference to malicious prosecution, trespass, and conversion of personal property. Though mention is made of the antitrust laws, no allegation showing a restraint upon interstate commerce can be found.

Argument.

As is noted above, plaintiff and a number of the defendants are citizens of California. Hence, no diverse citizenship exists. Accordingly, unless a Federal question is presented, the District Court had no jurisdiction.

Petitioner apparently contends that the case is one arising under the antitrust laws (Pet. p. 5). The complaint contains petitioner's conclusion that the acts alleged therein are violative of the antitrust laws, but the mere conclusion of the pleader is not, of course, sufficient to support a claim for relief. The complaint fails to allege any facts which show that a restraint of interstate commerce occurred or that petitioner suffered any damage by reason of the alleged acts of respondents. Petitioner's alleged loss of his "lands" is entirely unexplained. His "leases and leaseholds" are alleged to have been lost by the lessor's cancellation. If such cancellation occurred, it must have been based upon a default by petitioner thereunder and was proximately caused by such default rather than by any act of defendants. It is not even intimated that this default had any connection with defendants' acts. If such cancellation resulted from petitioner's arrest upon a criminal charge, his damage proximately resulted

from his own violation of the law. Obviously, no one can be required to respond in damages for causing the arrest of another when a conviction results. (See *Crescent Live Stock Co. v. Butchers' Union* (1886), 120 U. S. 141, 159; *Carpenter v. Nutter* (1899), 127 Cal. 61.) It is therefore clear that petitioner has not been damaged by anything proximately traceable to respondents. If, as was apparently intended at the outset, petitioner sought damages for libel, he failed to state a cause of action, because it is apparent from the complaint that the newspaper articles stated the truth. Moreover, such a cause of action would not be within the jurisdiction of the federal court.

Conclusion.

It is respectfully submitted that the trial court lacked jurisdiction of the action and that no claim upon which relief could be granted is stated in the complaint. The petition for a writ of certiorari is without merit and should be denied.

Dated: At Los Angeles, California, September 5, 1940.

OSCAR LAWLER,
MAX FELIX,
JOHN M. HALL,
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Attorneys for Respondent, Standard Oil Company of California, a Delaware Corporation.

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Respondents.

Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

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vs.

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Respondents.

Brief for Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 329] is reported in 108 Fed. (2d) 736. No formal opinion was rendered by the District Court. The remarks of the court at the time of the last hearing may be found at R. 283-286.

Jurisdictional Statement.

The petition for a writ of certiorari was filed on June 13, 1940. This was the last day of the three months' period following the denial of the petition for rehearing by the Circuit Court of Appeals [R. 331]. A certified copy of the record was not filed until on or about July 15, 1940. The petition therefore cannot be deemed to have been timely filed (sec. 8 (a), Act of Feb. 13, 1925, 43 Stat. 936, 940 (U. S. C. 28:350); Rule 38, Rules of the Supreme Court of the United States).

Statement of the Case.

This action was brought by petitioners in the United States District Court for the Southern District of California, Northern Division, against this respondent and numerous other defendants. The court sustained a demurrer to the first amended complaint, with leave to amend [R. 131-134]. Upon the filing of the second amended complaint, this respondent filed a motion to dismiss, upon the grounds that the complaint failed to state a claim upon which relief could be granted, that the court lacked jurisdiction, and that the cause of action, if any, was barred by the statute of limitations[1] [R. 246-250]. The court granted the motion and entered a judgment dismissing the action [R. 288-289]. Upon appeal, the Circuit Court of Appeals affirmed the judgment [R. 330] and denied a petition for rehearing [R. 331].

The second amended complaint alleged that petitioners "reside" in Fresno County, California, and that one of the other respondents, Standard Oil Company, was incorporated under the laws of the State of Ohio [R. 135]. There is no other allegation as to citizenship or residence of the parties.

It is quite impossible to determine with any clarity the facts upon which petitioners rely. However, allegation of the following is found in the second amended complaint [R. 135-179]:

> During 1919 "and thereafter" A. M. Gilstrap purchased 400 acres and leased 40,000 acres of land in Yolo County, California [R. 138], and engaged in

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[1]Similar motions were filed by other respondents [R. 183, 188, 233, 234].

"much exploration, drilling and locating" of oil and gas "in and beneath the same" [R. 138].[2] In 1924 he entered into a contract with defendant oil companies and the Browers whereunder the oil companies and the Browers agreed to commence drilling a well on those lands within ninety days and to drill thirty wells over a period of more than twenty years [R. 139], and whereunder Gilstrap was to be furnished with records and information concerning operations [R. 140], and was to receive one/twenty-fourth of the oil produced "or of the proceeds thereof" [R. 147]. Drilling was commenced within the ninety days, and (upon information and belief) oil was discovered [R. 141]. Upon "discovery and proof as aforesaid . . . said plaintiff during said times did and since has negotiated and agreed with the owners of other portions of said lands and leaseholds, and with other persons, firms and corporations, that he would drill or cause to be drilled in said County a great many other wells . . ." [R. 148-149]. Defendants, however, falsely reported that oil was not discovered by them [R. 149-150], and "in and during the years 1926-1937" removed their equipment and obtained from the owners of "a large number" of Gilstrap's leaseholds, long-term leases of the oil and gas and drilling rights, and drilled and produced oil thereunder [R. 149-150].

If thirty wells had been drilled and the agreement otherwise performed, plaintiffs would have profited

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[2]At an undetermined date "an interest in the plaintiffs' said business and properties of the value of about $50,000," was owned by petitioner Vera G. White [R. 163]. The complaint does not disclose that petitioner Cora D. Gilstrap had or has any interest in the property or in this action.

to the extent of $30,000,000 [R. 144]; and the prayer is for this amount plus treble damages and attorneys' fees [R. 167].

During "the years 1930-1932 . . . plaintiff A. M. Gilstrap . . . demanded of said defendants that they then terminate their said unlawful acts, and that they partially reimburse him for his large expenses and cost . . . of said leaseholds so caused and taken by the defendants . . ." Upon the failure and refusal so to do [R. 151], Gilstrap in 1930 [R. 158] commenced an action in the San Francisco Superior Court for damages suffered by him by the "breach of contract and taking of said leaseholds" [R. 152].

In October, 1932, Gilstrap was arrested and charged with violation of the California Corporate Securities Act, and (although it is alleged that the charge was unlawful [R. 159-163]), was tried and convicted, confined in the penitentiary for twenty-five months, and thereafter released on parole [R. 158]. While he was imprisoned defendants caused the above action in the state court to be dismissed [R. 159]. On several occasions defendants broke into plaintiff's dwelling house and took numerous records, papers, reports, logs, analyses, samples, maps, diagrams, letters and contracts [R. 153-155].

To the foregoing, plaintiffs added allegations on information and belief and in the form of conclusions of the pleader that all of the acts of defendants were forbidden by the antitrust laws of the United States [R. 153, 156].

ARGUMENT.

I.

No Federal Question Is Presented.

Diversity of citizenship is not shown by the complaint. Accordingly, unless federal jurisdiction can be supported upon other grounds, no jurisdiction exists. Petitioners apparently contend that jurisdiction can be based upon the "anti-trust laws of the United States" (see petition, pp. 5-6). The mere conclusion of the pleader that the acts were violative of the antitrust laws is, of course, insufficient to support a claim for relief, and the complaint fails to allege any facts which show that a restraint of interstate commerce occurred or that petitioners suffered any damage by reason of the alleged acts of respondents.

In stating Gilstrap's property rights the complaint refers to (1) oil leases obtained by him on 40,000 acres of land during "1919 and thereafter", (2) 400 acres of land purchased by him during "1919 and thereafter", (3) his contract right to receive one/twenty-fourth of the oil produced by defendants or the proceeds thereof, and (4) drilling rights obtained by him, upon the alleged discovery of oil by respondents, from "owners of other portions of said lands and leaseholds" and from "other persons, firms and corporations." So far as the complaint shows, Gilstrap still owns all of these rights. It is not alleged that the oil leases on 40,000 acres of land have been can-

celled or surrendered. It is not alleged that he has conveyed away the 400 acres of land owned by him. It is not alleged that he has lost the one/twenty-fourth interest in production, or that he has not received said fractional portion of the proceeds thereof. There is no allegation that he has lost the oil leases which he obtained after respondents' alleged "discovery and proof."

The allegations of the complaint concerning Gilstrap's conviction of a felony and confinement in prison cannot, of course, support a prayer for damages. Even though maliciously instituted, a criminal prosecution cannot be the basis for legal action where a conviction results.

Crescent Live Stock Co. v. Butchers Union (1886), 120 U. S. 141, 159;

Carpenter v. Nutter (1899), 127 Cal. 61.

II.

The Action Is Barred by the Statute of Limitations.

The original complaint was filed September 18, 1937.[3] If, as petitioners argue, the action is one arising under the antitrust laws, the applicable statute of limitations is California Code of Civil Procedure, section 338, subdivision 1 (*Foster & Kleiser Co. v. Special Site Sign Co.* (9th C. C. A., 1936), 85 Fed. (2d) 742 (cert. denied, 299 U. S. 613)). This section provides that "an action upon a liability created by statute, other than a penalty or forfeiture," must be brought within three years.

In the first amended complaint petitioners alleged that on November 10, 1930, Gilstrap filed an action in the San Francisco Superior Court against this respondent and others "wherein said plaintiff alleged and set forth the foregoing allegations of ownership, and damage as hereinafter more particularly alleged" [R. 8-9]. After the demurrer to this complaint was sustained, petitioners, in the second amended complaint, sought to avoid the effect of the former allegation, and changed the reference to the San Francisco Superior Court action to an allegation that a portion of the damages was therein sought [R. 158]. It is clear, however, from the other allegations of the second amended complaint that all of the claimed damages were suffered more than three years before the filing of this action. It is alleged that "during the years

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[3]The record does not contain the original complaint or show the date of its filing. The statement in the petition (p. 3) that it was filed September 18, 1937, is, however, correct.

1930-1932" Gilstrap sought and demanded that defendants pay him damages for "said leaseholds so caused and taken by the defendants" but that defendants "failed and refused" to do so [R. 151]. The trial court was correct in concluding from the foregoing that petitioners could not state a cause of action which is not barred by the statute of limitations [R. 286].

As the purported cause of action accrued prior to Gilstrap's imprisonment, petitioners are not entitled to rely upon such imprisonment as a disability. A disability does not prevent the running of the statute of limitations unless the disability is in existence at the time the cause of action accrued.

Harris v. McGovern (1878), 99 U. S. 161, 167;
Williams v. Long (1900), 130 Cal. 58, 59.

Conclusion.

It is respectfully submitted that the trial court lacked jurisdiction of the action, that no claim upon which relief could be granted is stated in the complaint, and that the cause of action, if any, was barred by the statute of limitations. The petition for a writ of certiorari is without merit and should be denied.

Dated at Los Angeles, California, September 5, 1940.

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